IN THE

Supreme Court of the United States

October Term, 1943.

No. 3.

A. M. ANDERSON, Receiver of the National Bank of Kentucky, of Louisville, - Petitioner,

vs.

KATHERINE KIRKPATRICK ABBOTT, Administratrix, Et Al., - - - Respondents.

PETITION FOR REHEARING

AND

SUPPORTING MEMORANDUM.

HENRY E. McELWAIN, JR.,
WILLIAM W. CRAWFORD,
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Attorneys for Respondents.

Louisville, Kentucky,
March 24, 1944.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

TABLE OF CASES.

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v.

KATHERINE KIRKPATRICK ABBOTT, ADMINISTRATRIX WITH THE WILL ANNEXED, OF THE ESTATE OF DAVID J. ABBOTT, DECEASED, ET AL., - - - - - *Respondents.*

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come Katherine Kirkpatrick Abbott, Administratrix With the Will Annexed, of the Estate of David J. Abbott, Deceased, *et al.*, the respondents herein, by counsel, and respectfully petition and move the Court to grant a rehearing in the above entitled cause in which an opinion was filed March 6, 1944, reversing the judgment of the Circuit Court of Appeals for the Sixth Circuit and remanding the cause to the District

Court for the Western District of Kentucky for further proceedings.

Counsel for respondents certify that this petition for rehearing is presented in good faith and not for the purpose of delay.

HENRY E. MCELWAIN, JR.,
WILLIAM W. CRAWFORD,
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MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR REHEARING.

May it please the Court:

Respondents, with full recognition of the power, and sometimes the duty, of the Court to declare new principles of law on proper occasion, and with full awareness of the finality of any adjudication made after full consideration of the case presented, believe they have a right to insist that the judgment of this Court, as distinguished from general observations in the opinion, should be founded upon a correct analysis

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Italics in this brief are ours, unless otherwise indicated.

and statement of the facts presented. It is most earnestly and respectfully submitted that the Court has been misled in the instant case into the acceptance of certain errors as to facts which were fundamental to the determination of the case, facts which, if correctly stated, must change the conclusion reached. Counsel charged with responsibility for the interests of over three thousand individual stockholders feel that an adjudication against these respondents in this Court of last resort should at least be based upon a meticulously correct interpretation of the record and should have due and proper regard for findings of fact made by the courts below and accepted by this Court.

Impelled by this firm belief, respondents have felt themselves fully justified in presenting herewith their Petition for Rehearing in full confidence that the Court will insist upon conforming its decree to the precise case before it. In support of their petition, respondents, avoiding any general reargument of matters which were obviously given close consideration by the Court, briefly present the following matters, important to a correct decision, which seem to have escaped the careful attention of this Court.

I.

RESPONDENTS ARE ENTITLED TO HAVE THEIR PLEAS OF ELECTION AND RES JUDICATA ADJUDICATED UPON THE ACTUAL FACTS AS PRESENTED BY THE RECORD.

Whether respondents are right or wrong as to their contention that the legal principles of election and *res judicata* are applicable in this case, they are at least entitled to have these principles applied with reference to the exact facts.

The Court rejects respondents' pleas of election and *res judicata* based upon the case of *Laurent* v. *Anderson*, 70 F. (2d) 819, upon the ground that the basis of liability in the *Laurent Case*—that is, "apparent" or titular ownership"—was different from the basis of liability in the instant case—that is "actual or beneficial ownership." This is the familiar distinction between the record holder and the real owner, the former being held liable on the ground of estoppel and the latter on the ground of ownership.

The law is right but the facts are wrong. If Banco had been merely the record holder of the Bank stock in question, petitioner might not have been put to an election to sue either Banco or the actual owners, whoever they might be. He might have sued both, as the Court has said. But if he had obtained a judgment against Banco *as the real owner*, petitioner could not thereafter have maintained a suit against any other persons in that capacity, since in the nature of things (except in cases of joint ownership not here involved),

there can not be two real owners of the same shares. This is the law as laid down in the Court's opinion. It is the law as laid down in innumerable cases, including many cases from this Court. It is the law of this case.

Banco is not, and never was, the "record" holder of shares of stock in the National Bank of Kentucky. The contrary has been asserted by the Receiver but no evidence has ever been produced to support that assertion.

Petitioner's "Request for Admissions" filed in evidence by him contains in part the following statement of fact, admitted as true by respondents:

> "That at the time of the closing of the National Bank of Kentucky it had issued and outstanding 40,000 shares of capital stock of the par value of $100.00 each; that 39,820 of said shares were registered on the stock ledger of said Bank in the names of Henry Vogt, Thomas J. Minary, Stuart E. Duncan, Allen P. Dodd, Charles H. Bohmer and Ben J. Metcalfe, as Trustees under Trust Agreement dated April 22, 1927. * * * That the remaining 180 shares of said Bank were registered on the stock ledger of said Bank, 10 shares each, in the names of eighteen directors * * *" (II R., p. 76).

The Louisville Trust Company and the National Bank of Kentucky were affiliated institutions. Shares of the capital stock of each were held by trustees who, in turn, had issued Trustees' Participation Certificates. The holders of these certificates were not the *record* holders of stock in the two institutions albeit they were the *actual* owners.

All that BancoKentucky ever held was Trustee's Participation Certificates. It was never the record holder of a single share of stock in the National Bank of Kentucky.

The trustees under the Trust Agreement between the stockholders of The Louisville Trust Company and the National Bank of Kentucky were the *record* holders of the shares. No one else was a record holder of those shares.

BancoKentucky was held liable for the statutory assessment in *Laurent* v. *Anderson, supra,* because it was the actual owner of the shares by virtue of its holding Trustees' Participation Certificates, and for no other reason.

In that opinion the Court said (p. 824):

> "The evidence establishes that Banco was in every sense the true and beneficial owner of the National Bank stock involved; the trustees holding only a bare legal title to the stock. * * *
>
> "The petition and especially the evidence sustain recovery against Banco as the real and beneficial owner under section 64 of the National Banking Act (12 U. S. C. A.)."

Similar conclusions were reached in *Anderson* v. *Abbott,* 127 Fed. (2d) 696, and *BancoKentucky's Receiver* v. *Louisville Trust Company's Receiver,* 263 Ky. 155.

Thus the position of Banco, as the actual, as distinguished from the record, owner is doubly established; by the record itself, and by final adjudications to the same effect by courts of competent jurisdiction.

We believe that the principles of election and *res judicata* are clearly applicable in this case on well-established grounds. Certainly they may not properly be disallowed on the only ground stated in the opinion.

II.

THE COURT HAS INCORRECTLY ANALYZED THE RECORD AS TO WHAT BANCO WAS; AS TO THE INTENTION AND KNOWLEDGE OF TRANSFERORS OF STOCK; AND AS TO THE TYPE OF SECURITY ACQUIRED BY OUTSIDE PURCHASERS.

The opinion of the Court contains the following statement:

> "It [Banco] was negotiating for the purchase of the shares of an investment banking house when that house, the Bank and the Trust Company failed. This was in November, 1930—a little more than a year after Banco began its financial career" (Opinion, p. 3).

The statement with reference to the "purchase of the shares of an investment banking house" refers to the purchase by Banco of one-half of the capital stock of Caldwell & Company of Nashville. We respectfully submit that the Court has misunderstood the record with reference to that matter. Banco was not "negotiating" for the purchase of the Caldwell shares at the time when the National Bank of Kentucky failed. The facts with reference to this transaction are as follows:

The negotiations with Caldwell were initiated about eight months before the failure of the Bank, and within

six or seven months after Banco was organized. At a meeting of the directors of Banco on April 15, 1930, President Brown reported the result of prior negotiations between himself and Caldwell. A resolution was adopted authorizing President Brown to close a contract with Caldwell & Company upon the terms submitted by Brown (Plaintiff's Exhibit 23, Vol. III, p. 1105). The contract was actually executed on May 29, 1930 (*idem*, p. 1107). On June 2, 1930, President Brown announced in the public press the "consummation" of these negotiations, declaring that the "financial structure" thus erected would "undoubtedly stand out in the future as one of America's greatest financial institutions" (Plaintiff's Exhibit 26, Vol. III, p. 1207). On the same day, the local press in Louisville carried a full announcement of the transaction, including the following (*idem*, pp. 1208-1209):

> "Combination of the institutions is expected to be of much importance in further extension and development in commercial and investment banking and insurance fields, according to the heads of the organizations.
>
> "'The importance of the association of the BancoKentucky Company and Caldwell & Co. to the greatest business section of the United States cannot be overestimated,' Mr. Caldwell said. 'It brings to the Middle West, the Eastern Central and the Southern States capital that will be sufficient to meet every requirement of business, industry and development in this entire section of the country, and will be a great stabilizing factor in the financial structure of this territory.'"

Ten thousand shares of Caldwell & Company were transferred to Banco and thereafter appeared as an asset upon the balance sheet of that company. Seven hundred thousand shares of Banco were transferred to Caldwell & Company, two hundred thousand additional shares being held in escrow pending the valuation of the assets of Caldwell & Company, with provision made for a fixed, financial adjustment, one way or the other, if the appraisal showed that the value of the Caldwell assets was either more or less than the amount stated in the contract.

It was not until November 5, 1930, more than five months after the closing of the contract and the exchange of shares, that the Louisville press published a dispatch from Nashville, Tennessee, to the effect that Caldwell & Company was in difficulties and its affairs had been placed in the hands of a committee of the Nashville Clearing House (Plaintiff's Exhibit 26, Vol. III, p. 1215). On the following day, November 6th, the papers published a false statement from President Brown to the effect that the negotiations between Banco and Caldwell had never been "consummated" and that consequently Banco was "not connected in any way with the affairs of Caldwell & Company" (*idem*, p. 1220).

For present purposes it is entirely unnecessary to pursue further the argument as to whether the sale was consummated or not. That question is now immaterial. However, the following facts in connection with this transaction, completely overlooked and disregarded by the Court, are of extreme importance.

First: Caldwell & Company, admittedly a reputable and apparently successful investment house and found by the court below (I R., p. 258) to be "known as the largest and strongest investment house in the South" represented in writing in this contract (I R., p. 260) that—

> "as of May 28, 1930, its assets were of such fair aggregate value that, after deducting therefrom all of its liabilities, it had a net worth of not less than $9,000,000.00."

Second: Banco represented in the same writing (I R., p. 260) that it—

> "had no liabilities and on said date (May 1, 1930) it had cash to the amount of $1,297,893.47 and good and collectible notes in the principal amount of not less than $2,000,000.00."

Third: The Receiver of the Bank, petitioner here, recognized this transaction as valid and binding, at least to the extent of five hundred thousand shares of Banco stock; made no effort to set aside the transaction; and in his bill of complaint admitted these five hundred thousand shares as validly issued and outstanding by including them in the 2,072,468 Banco shares alleged to be subject to the assessment liability asserted in his bill.

Fourth: The very fact that this transaction was undertaken—whether it was consummated or not—corroborates all of the evidence in the case to the effect that Banco was not, and was not intended to be, merely a bank stock holding company.

Fifth: As of the date of said contract (May 28, 1930), if the representations therein made by persons of reputed character and integrity were true (and so far as these thousands of stockholders knew, they were), Banco would have had free assets, aside from bank shares, of a declared value of $7,797,893.47* as against a maximum assessment liability on all bank shares held by it of $7,502,650.00,† and it actually then had approximately 30 per cent of its outstanding stock issued for assets and securities other than bank stock.

Sixth: This was the last publicly announced transaction of any importance that Banco had, or of which the stockholders may be held to have had knowledge or to have approved.

The opinion of the Court ignores all of these facts and brushes them aside with the bare statement above quoted (Brief, p. 8). It scarcely comports with conceptions of fair play, for the Receiver of a National Bank to admit that Banco issued a large percentage of its capital stock for non-banking investments when such admission seems advantageous, and then to induce this Court to deny that fact when such a course appears better to suit his purposes.

It is easy to understand why the Receiver and his counsel, by looking back at it through the haze of 15 years, seek to dismiss this transaction as a meaningless

*As declared in the Caldwell contract (I R., pp. 259-262), and composed of the following items: Cash, $1,297,893.47; Good and Collectible Notes, $2,000,000.00; and one-half interest in Caldwell as represented, $4,500,000.00.

†This was a variable figure. The par value of bank stocks owned at the time of the Caldwell contract, as listed therein (I R., p. 260) was $7,502,650.00. The par value of bank stocks owned at the date of closing (Nov. 17, 1930) was $7,770,780 (II R., p. 97).

exchange of worthless stock between two broken-down companies, as has been done both in brief and argument because the transaction stands in the way of the case he tries to make. The best evidence of the *reality* of this transaction, from a thoroughly unbiased observer, is found in the report of the Chief National Bank Examiner as of September 17, 1930 (Pl. Ex. 20, II R., p. 930), where he spends six pages of his report giving a careful analysis of the relationship between Banco and Caldwell and its collateral effects upon the Bank. The transaction was real enough to him.

It was also real enough to the Kentucky Court of Appeals as appears from its opinion in a case in which that question was an important issue. *Kentucky Title Trust Company* v. *Weil,* 281 Ky. 763. In its opinion the Court said:

> "But excluding all incompetent evidence, there is left sufficient competent evidence which clearly and convincingly proves Brown perpetrated a fraud upon Weil by representing to him that there would be no merger with Caldwell & Company until an audit was completed showing that company to be in good shape, *when at that time the merger had already been consummated as Brown knew.*"

The ultimate conclusion of the Court that "Banco emerged as a bank stock holding company" is therefore incorrect. Such a statement presents a picture of Banco as being other than it was and forms an untenable basis of liability against these respondents.

Had the representations of Caldwell & Company been true, and had that company not later failed, these respondents, as we read the opinion, would not have been liable. Their liability therefore is made to arise either (a) because Caldwell made a false statement or (b) because Caldwell later failed, neither of which ground is a sufficient basis for liability under the statute.

The Court's opinion apparently does not mean that stockholders, even of a bank stock holding company, are perpetual *guarantors* of its assets, or even of the integrity of its officers, with liability fluctuating between existence and non-existence dependent upon unpredictable market variations or changing individual characteristics. As the Court pointed out, *shareholder* relationship and responsibility should not depend on merely "whimsical" circumstances.

In any event, Banco's situation at the date of the Caldwell transaction appeared to meet all of the requirements as to "solvency" as indicated in the opinion. A correct understanding and evaluation of these facts is essential to a fair adjudication of the liabilities of the respondents in this case.

III.

IF A NEW AND EXPANDED CONCEPT OF LIABILITY IS TO BE APPLIED, IT SHOULD HAVE RELATION TO THE ACTUAL CASE PRESENTED AND NOT TO A MERELY HYPOTHETICAL CASE.

If respondents are to be subjected to liability in this case, their liability should at least arise out of their own actions. They should not be held liable for things they never did nor intended to do.

The Court accepts the findings of fact of the courts below. The District Court found that "Banco was formed for the purpose set out in the letter of July 19, 1929, *and for no other purpose*" (I R., p. 267). The Circuit Court of Appeals concurred in this finding and this Court says that it accepts it.

But the Court takes no notice of the evidence of the purposes of investors in Banco stock or of the findings of the courts below upon this subject. It proceeds to discuss the case as involving a corporation owning only bank shares. This is entirely inconsistent with the facts shown by the record, and found by the courts below, findings which this Court has accepted as supported by the record.

The prospectus of July 19, 1929, is undoubtedly the best evidence of such intention. This prospectus was mailed to each certificate holder (Finding 20; I R., p. 255). It is the only piece of information definitely shown by the record to have been *actually* received by any substantial group of stockholders. It was published at length in the local press on two separate occa-

sions, July 20 and 21, 1929 (Pl. Ex. 26, Vol. III, pp. 1165, 1168). Upon the trial of the case, petitioner also was of the opinion that this prospectus was the best evidence of intention. On that ground he objected to the respondents giving testimony as to the purpose for which Banco was organized (III R., p. 177), and did his best to prevent them from testifying.

The prospectus is silent as indicating any intention that Banco should be merely a bank stock holding corporation. It mentions no bank stock at all except that of National Bank of Kentucky and Louisville Trust Company. Most of the respondents did not have occasion to testify on this question because the District Court, after hearing the testimony of some of them, on its own motion and in order to save time, suggested a stipulation by the parties as the basis of an order which the Court entered, to the effect that the remaining respondents (except officers, directors or employees), if introduced as witnesses, would testify

> "that they acquired their stock in BancoKentucky Company in the belief that they were making a sound financial investment in a separate corporation, *and that the BancoKentucky Company was to do the things authorized by its corporate charter, as indicated in the letter of July 19, 1929".* (I R., p. 174; III R., pp. 275, *et seq.*).

The knowledge and intention of the stockholders has been considered an important element in all cases in which the question of double liability was considered, including those mentioned in the opinion as point-

ing the way toward the extension of the doctrine of double liability in so-called holding company cases.*

For example, in *Nettles* v. *Childs*, 100 Fed. (2d) 952, the decisive point in the case was whether or not the stockholders knew that the company was intended to be solely a bank stock holding company, and those stockholders who were not advised of the fact that the company held only bank stock were excused from liability on the ground that they were incorrectly informed.

The kind of company that Banco was intended to be is made perfectly clear by the evidence and the matters leading up to its organization are undisputed. The officers and directors of the two banks had a number of informal discussions prior to the issuance of the prospectus. From the outset, Banco was intended to be an operating company. It has never been denied that the acquisition of an interest in certain banks was an important part of the plan. As one witness put it:

> "The purpose, or one of the purposes, was to acquire banks in the Ohio Valley *as a reservoir of finance*" (III R., p. 53).

Another expressed the purpose of acquiring interest in banks as

> "a means to an end, and certainly not the thing that would yield the greatest profit" (III R., p. 220).

And still another witness described the purpose thus:

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*In passing, it is pertinent to observe that these so called "point-the-way" cases were all decided long *after* the organization of Banco.

> "We didn't expect to make very much money out of the banks, that was merely to be an outlet for the business that Banco expected to do. We never would have bought a bank for the money we could make out of it" (III R., p. 271.)

Obviously general discussions among relatively large groups would lead to differing impressions received by the several members of the group, and it is not strange that individual expressions of intention should vary (III R., pp. 66, 139, 178, 195, 220). For this very reason, the prospectus must be taken as representing a composite picture of an aggregate purpose. The above statements are fully corroborated by the minutes of the Board of Directors of the Bank held on June 7, 1929, which recite:

> "Mr. Brown's proposition to form a new Company with a proposed capital of $20,000,000 organized to own stock of other corporations, all, or any part, buy and sell securities, original and refinancing, etc., was submitted to the Board of Directors and the Board expressed themselves as favorable and on motion duly seconded and unanimously carried the President was authorized to proceed along the lines outlined" (Pl. Ex. 21, Vol. II, p. 992).

There was never any dispute in the evidence that Banco was at all times intended to have a very large working capital to carry on its various enterprises over and above the acquisition of bank stocks.

In view of the undisputed evidence and findings of the courts below, we respectfully submit that it is not

fair to respondents to say that their intention was evidenced by statements made by, or to, the Chicago Board of Trade or Blyth and Company, and that their liability is to be hinged on any such inconclusive evidence. The respondents in this case were all residents of Louisville or the Western District of Kentucky. There is no showing that they ever knew or heard of these casual statements emanating from Chicago. Petitioner made no effort to make any such showing and respondents were not given an opportunity of denying it. As a matter of fact, evidence of this character was so obviously incompetent that much of it was very properly excluded at the trial. (See III R., p. 3[illegible]). If they are to be held responsible for their acts and intentions, such acts and intentions should be measured by information locally available at the time Banco was organized.

The seeming discrepancies between the purposes of the stockholders and the final "emergence" of Banco is easily explained. In point of fact, Banco never did "emerge" in accordance with the original intention. Within one month after subscriptions had been closed, the first calamitous break in the stock market occurred on October 29, 1929. Thereafter, it was impossible to raise the amount of free capital which had originally been intended. Every step to enable the corporation to do so was taken, including an increase in its authorized capital stock. This was to be available for sale generally for the purpose of providing such capital as soon as market conditions improved. In the meantime, it was found that certain exchanges of stock

could be made upon a fair basis. The situation was thus explained in the record (III R., p. 115):

> "After the stock market break in October, the charter of Banco was amended so as to increase the authorized capital stock from 2,000,000 to 5,000,000 shares. The reason we did exchange some of this newly authorized stock for bank stock instead of selling it on the market for cash is an economic proposition, that there was a parity of value of the corporation where you are trading stock, just a little different from raising cash. When the crash in the market came, it was easier to swap stock than it was to sell for cash, at that particular time. *The plan of the organizers of Banco-Kentucky to create a fund for the purpose of engaging in the lines of business and the purchase of other types of shares other than Bank stock, had not been abandoned in any way.*"

But, as we have pointed out, the Court takes no notice of all this, treating the findings of the courts below as to intention as having no significance. "It is," says the Court, "the condition of Banco at the end of the promotion which is significant. Banco emerged as a bank-stock holding company." This is a novel use of the word promotion. In the sense in which that word is customarily used, the promotion of Banco terminated with the incorporation and organization of that company or, at least, with the closing of the subscriptions to its stock as of September 19, 1929. The company then attempted to enter upon the activities for which it was organized. This is the time

at which it "emerged" as an operating company, having then obtained possession of substantially all trustees participation certificates and having, in addition, approximately $10,000,000.00 in cash.

The ultimate purpose to have a working capital of at least $20,000,000.00 was never abandoned until the collapse of the market and of the company rendered it impossible.

It will thus be seen that the Court is not adjudicating the rights of the respondents on the basis of what they intended to do, or of what they knew or expected, when they acquired their stock. It is, on the contrary, treating them as stockholders in a kind of corporation which they never did organize or invest in.

Liability accordingly is made dependent upon intervening events and not upon an analysis of their stockholder relationship to the corporation.

CONCLUSION.

In the latter part of the opinion (page 13) the Court has correctly stated that liability has been placed by Congress upon "stockholders" or "shareholders." With this we are in entire agreement. This statement, however, cannot possibly be reconciled with grounds of liability indicated in the earlier part of the opinion where the Court says that liability is to be determined by questions of "control" and "solvency."

In September, 1929, whatever elements of "control" may have then existed, Banco had, at that time, free assets of approximately $10,000,000.00

which was more than double the amount necessary to meet any claim of double liability. Had the company remained static at this point, the opinion concedes that the stockholders of Banco would not have been liable. But if they were not liable, it must have been because they were not *then* stockholders of the Bank. Their position as stockholders did not change between September, 1929, and November, 1930. Either they were stockholders during the entire period or they were not. If they would not have been liable in September, 1929, at what point thereafter did they become liable and for what reason? Again, in May, 1930, as above shown, Banco had a substantial investment in non-banking assets, and was believed to have free assets approximately equal to 100% of all possible assessment liabilities. Respondents feel entitled to ask whether they were *then* the stockholders of the Bank or were not. The principal event after that date was the unauthorized dissipation of its assets, in supporting the market for its shares, unknown to, and unheard of by these respondents.

The concept of non-liability on the ground of solvency and the concept of liability on the ground of stockholder relationship are completely irreconcilable. It is apparent, therefore, that the Court has not enforced a declared public policy, but has originated a new basis of liability.

The solvency concept of liability is entirely different from liability grounded on fraud, transfers to avoid liability or other evasions. In such cases there is always the fact of fraud or evasion, easily susceptible

of proof at a given point of time and in direct reference to the particular means employed to effectuate such purpose. A court of equity from time immemorial has been empowered to look through or disregard such transactions, and to remit the parties to their original position. Thus, there is no inconsistency in saying that stockholders who have been guilty of fraud or evasion continue to remain as such.

This is entirely different from saying that stockholder liability does not exist under a corporation organized with a reasonable amount of free assets, but may spring into existence anew upon the later dissipation of such assets or their mere reduction in value.

Even Congress in 1933 did not go so far. Congress did not, in fact, impose any such liability at all. It said only that certain safeguards should be created if the corporation wished to *vote* the stock. The decision here goes far beyond any policy even hinted at by Congress.

Unless liability here asserted is to be imposed absolutely, without reference to knowledge or intention, the decision should be changed. And certainly knowledge and intention, except in cases of clear statutory liability, are important factors to be considered by a court of equity. The equity forum was chosen here deliberately by petitioner. The issues of fraud and evasion were elaborately tried in the District Court and petitioner lost. It now appears that the decision is to turn upon questions and issues hardly conceived when the case originated.

Regardless of what the Court may determine as to the policy of Congress in the case of a corporation formed for the sole purpose of holding bank stock, respondents respectfully submit that they are entitled to have their case heard and adjudged on the basis of the exact facts. Despite a few, scattered indications to the contrary, the overwhelming weight of the evidence, and the findings of two courts, show that Banco was not intended to be, and in fact was not, a mere bank-stock holding company. It was not the type of company discussed in the opinion. It always had non-banking assets, sometimes of a value twice the total assessment liability on bank stocks held by it, sometimes not so much, but, so far as these stockholders knew or were advised, always substantial in amount. In the difficult market situation in which Banco found itself it went as far as the circumstances permitted to carry out the purposes for which the company was formed.

It is respectfully submitted that respondents' Petition for Rehearing filed herewith, should be granted.

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Louisville, Kentucky,
March 24, 1944.